

EXHIBIT 5

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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TETRIS HOLDING, LLC, and THE
TETRIS COMPANY, LLC,

Plaintiffs and,

Counterclaim Defendant Civil Action No.

-against-

3:09-CV-6115

(FLW) (DEA)

XIO INTERACTIVE,

Defendant and

Counterclaim Plaintiff.

-----x

August 11, 2011

11:23 a.m.

Videotaped Deposition of JEFFREY C. NEU,
taken by Plaintiff, pursuant to subpoena, at the
offices of Kirkland & Ellis, LLP, 601 Lexington
Avenue, New York, New York, before SUZANNE
PASTOR, a Shorthand Reporter and Notary Public
within and for the State of New York.

A P P E A R A N C E S:

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ALSO PRESENT:

MICHAEL DAVIDSON, Videographer

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2 expression of the game?

3 MS. MAITRA: Objection;
4 mischaracterizes the document and lacks
5 foundation.

6 A. I don't recall.

7 Q. Do you have any notes of your
8 conversations with XIO?

9 MS. MAITRA: Objection; asked and
10 answered.

11 A. Not that I'm aware of.

12 Q. I'm going to mark Exhibit 31.

13 (Neu Exhibit 31 for identification,
14 Bates XXX-PRIV-XXX-XIO-DG 100730.)

15 Q. Exhibit 31 is a document produced
16 by XIO with the Bates number XXX-PRIV-XXX-XIO-DG
17 100730. It's an e-mail from Jeffrey Neu to
18 Desiree Golen dated September 29, 2009 and it
19 has attached memorandum to it.

20 Jeff, do you remember sending this
21 e-mail to Ms. Golen?

22 A. I don't remember pressing the
23 "send" button. But I do remember that an e-mail
24 was sent with what appears to be this memo.

25 Q. You wrote, "Sorry for the late

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2 reply. Attached is the memo that I had
3 written." Correct?

4 A. Yes.

5 MR. ULMET: Objection. You can
6 answer.

7 A. That is what it says.

8 Q. So let's turn to your memo.

9 A. Sure.

10 Q. Do you recognize this memo?

11 A. Yes, I do.

12 Q. And this was the memo, or the
13 document you were referring to earlier in the
14 deposition that you can't -- you don't have a
15 copy of this particular e-mail and this
16 particular final draft of the memo, correct?

17 A. I believe that is accurate, yes.

18 Q. And you don't know why you don't
19 have it.

20 A. No, I don't know why. I commented
21 to my counsel that I couldn't find it. I'm not
22 sure why. I have no reasoning other than the
23 switching of law firms and the changing of
24 systems, it may have been lost.

25 Q. Who is Jennifer Yoon?

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2 A. She is a former associate of mine.

3 Q. Did Desiree Golen tell you that she
4 had read your memo?

5 A. I don't recall. I assume she did.

6 Q. Did you discuss the memo with her
7 after you sent it?

8 A. I don't know. I believe that this
9 memo was one of the teetering points of our
10 working relationship.

11 Q. She didn't like what you said in
12 this memo, right?

13 MS. MAITRA: Objection; calls for
14 speculation.

15 MR. ULMET: Objection.

16 A. I don't know that I can speculate
17 as to that.

18 Q. Did she tell you that she didn't
19 like the advice that you provided in this memo?

20 A. I don't recall her ever expressing
21 that sentiment.

22 Q. Why did you think it was the
23 teetering point?

24 A. Because shortly after this memo was
25 given to her she engaged a different law firm.

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2 The facts, in my opinion, speak for themselves.
3 Unless there is something that I had done in the
4 past that she didn't like and she didn't tell me
5 about, which is possible.

6 Q. So in your opinion, this memo led
7 to your termination as XIO's lawyer.

8 MR. ULMET: Objection.

9 MS. MAITRA: Objection, misstates
10 the testimony and calls for speculation.

11 MR. ULMET: I wouldn't get into
12 that too much. It has nothing to do with
13 whether Mino is similar to Tetris.

14 Q. All right, so the first page of the
15 memo, it says, "This memorandum discusses the
16 present state of copyright laws of video games.
17 In particular, it addresses the copyrightability
18 of video games and the infringement analysis the
19 courts use to determine whether or not a video
20 game is infringing and already copyrighted video
21 game. Finally, this memo briefly addresses the
22 issue of trade dress infringement." Do you see
23 that?

24 A. I do.

25 Q. The Borland case is not mentioned

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2 in this memo.

3 MR. ULMET: Is there a question?

4 Q. Well, I'm telling you that it's
5 not, so you don't have to read the whole thing.
6 But I'm representing to you that Borland is not
7 mentioned here. Is that because it was your
8 opinion as of September 25th, 2009 that Borland
9 was not relevant to this analysis?

10 MS. MAITRA: Objection. Lacks
11 foundation.

12 MR. ULMET: Objection; lacks
13 foundation.

14 MS. MAITRA: Calls for speculation
15 and asked and answered.

16 MR. ULMET: There's no indication
17 that there ever was any mention of Borland in
18 this memo. I don't know why you --

19 MS. SCHMITT: This memorandum lists
20 a lot of cases which are purportedly relevant to
21 the analysis of whether Mino infringes Tetris.
22 I'm saying that a case that was discussed
23 earlier is not mentioned here.

24 Q. My question is, is the reason it's
25 not mentioned in this memo because it's not

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2 relevant to the analysis?

3 MS. MAITRA: Objection; lacks
4 foundation, calls for speculation, calls for a
5 legal conclusion and outside the scope.

6 A. The short answer is the omission of
7 Borland has no reflection on whether it would be
8 applicable or not. The omission or inclusion of
9 any of these cases is due to the work of Ms. Jen
10 Yoon and not from my directing of her to pay
11 attention or not to pay attention to any
12 particular case.

13 Q. Well, you said in your cover e-mail
14 that you wrote the memo.

15 A. No, I said that I had it written,
16 not that I wrote it. But I had it written.

17 Q. It says attached is -- oh, "I had
18 written." I see, that you directed to be
19 written.

20 A. That's correct, yes. Which is why
21 it says on page 2 from Jennifer Yoon to me.
22 Because it was not intended to be a client memo.
23 It was intended to be an internal memo, but the
24 client, if I recall correctly, wanted to see the
25 memo and I forwarded it along.

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2 Q. Ms. Yoon was an associate who
3 worked for you, correct?

4 A. That is correct, yes.

5 Q. And in your experience, did she
6 produce accurate and thorough work product?

7 A. She was a very responsible
8 attorney.

9 MS. MAITRA: Objection; vague.

10 Q. Go ahead.

11 MS. MAITRA: Sorry, I missed the
12 answer. What was the answer?

13 A. The answer is I believe Ms. Yoon is
14 a very responsible attorney.

15 Q. And competent attorney?

16 A. Competent attorney as well.

17 Q. Did you read this memo before you
18 sent it to Ms. Golen?

19 A. My assumption is based on the time
20 at which it was sent, the likelihood of me
21 spending much time with this memo is negligible.
22 I am sure I read it. The amount of time I spent
23 perusing it I am not sure of.

24 Q. But you have no reason to believe
25 that what she wrote in here was inaccurate,

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2 correct?

3 MR. ULMET: Objection.

4 A. I have no reason to believe that.

5 Q. Where is Ms. Yoon now?

6 A. I believe she's just taken a job in
7 Boston with the firm of -- where does Christine
8 work now? What's the name of her firm?

9 MR. ULMET: Who?

10 A. Christine. I can't remember
11 the name of the firm.

12 MR. ULMET: Procter?

13 A. Procter Goodwin. Goodwin Procter.
14 I believe she has just taken a job in the IT
15 department at Goodwin Procter.

16 Q. Does Ms. Yoon still have the same
17 last name, to your knowledge?

18 A. As far as I am aware, yes.

19 Q. And you directed Ms. Yoon to write
20 this memo, correct?

21 A. As far as I recall, yes.

22 Q. And she writes on the first page
23 under the bullet that says, "Access to the
24 copyrighted work. In our case, access will be
25 easily established based on Tetris' wide

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2 availability."

3 Do you agree with that statement?

4 MS. MAITRA: Objection.

5 MR. ULMET: Objection.

6 MS. MAITRA: Outside the scope of
7 this deposition. This deposition is only
8 regarding pre litigation communications with the
9 defendant about whether Mino infringes Tetris.
10 That's a court order.

11 MR. ULMET: Whether he agrees with
12 the statement is irrelevant.

13 Q. This statement was passed along to
14 Ms. Golen as legal advice, correct?

15 MS. MAITRA: Objection;
16 mischaracterizes testimony.

17 A. I would say that this statement --
18 this memo was passed on to Ms. Golen because she
19 requested it.

20 Q. And in that memo that you passed
21 along to Ms. Golen in September of 2009, it
22 reads, "Access will be easily established based
23 on Tetris' wide availability," correct?

24 A. Yes, I believe that's what it says.

25 Q. And a little further down in the

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2 next bullet points it says, "Our" -- again, this
3 is in a memo that was transmitted to Ms. Golen.
4 It says, "Our case will hinge on this
5 substantial similarity element." Correct?

6 A. It does say that, yes.

7 Q. And in this memo you told Ms. Golen
8 that, "It is well established that video games
9 are," capital A-R-E, "copyrightable."

10 MS. MAITRA: Objection; lacks
11 foundation.

12 MR. ULMET: Is there a question?

13 Q. I'm asking is it correct that in
14 this memo that he transmitted to Ms. Golen
15 included the statement, "It is well established
16 that video games are, A-R-E, copyrightable."

17 A. That's what it says.

18 Q. And in this memo that you sent to
19 Ms. Golen it also says in italics, "We should
20 not --" not in italics. "We should not waste
21 the court's time arguing that the video game is
22 not copyrightable unless we can make a case that
23 there is no separable expression, separable
24 beyond any idea in the Tetris game," and then in
25 italics, "I think this would be a losing

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2 argument and a waste of our efforts," correct?

3 A. That's what it says.

4 MS. MAITRA: What's the question?

5 MR. ULMET: Objection; what's the
6 question?

7 Q. You sent that statement in this
8 memo to Ms. Golen on September 29th, 2009,
9 correct?

10 A. That's correct.

11 Q. And does this memo represent your
12 legal opinion that you agreed with?

13 MS. MAITRA: Objection --

14 Q. In other words, I don't want to get
15 caught up on what Ms. Yoon thought versus
16 Mr. Neu. I already established that you respect
17 Ms. Yoon, she was your associate, she did this
18 at your direction. You sent this to Ms. Golen.
19 So I want to establish if you agreed with what
20 Ms. Yoon wrote in this memo that you then passed
21 along to your client at XIO.

22 MS. MAITRA: Objection. Outside --
23 I couldn't tell whether it was past tense or
24 present tense. If it was -- was it past tense
25 or present tense?

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2 MS. SCHMITT: What do you mean?

3 MR. ULMET: Are you asking him do
4 you agree or did you agree when --

5 Q. Did you agree?

6 MS. MAITRA: Sorry, then no
7 objection.

8 A. My opinion of the memo was that the
9 reason that this was -- and the way it was
10 initially drafted was to educate me as to what
11 she thought was the current state of the law.

12 Q. And you rely on Ms. Yoon's
13 analysis, correct? Or you relied on it in
14 September 25th, 2009, correct?

15 MS. MAITRA: Objection. Vague.

16 MR. ULMET: Relied for what?

17 MS. MAITRA: And misstates
18 testimony.

19 MS. SCHMITT: To give his client
20 advice.

21 A. So I respect Ms. Yoon's work. I
22 don't necessarily always agree.

23 Q. Is there anything -- did you agree
24 with the statement that it is well -- as of
25 September 25th, 2009, did you agree with the